week, respectively; and neither has a reach comparable to ABC, CBS, NBC, or Fox."[27] Yet it inexplicably neglects to address whether the public interest would be served by affording the "incipient networks" an opportunity to mature.

The established networks do not assert explicitly that UPN or WB are mature entities -- an assertion that would be patently absurd -- but they imply that the new networks can compete on a level playing field with ABC, CBS and NBC because they were launched by large companies.[28] Whoever its backers, a new network will never be able to compete on an equal footing with ABC, CBS, NBC and Fox unless it can achieve comparable coverage. This is starkly illustrated by recent reports of the networks' financial performance. The trade press has reported that ABC, CBS, NBC and Fox are booming -- despite loss of market share by ABC, CBS and NBC in recent years -- while the UPN network lost $38 Million during the first quarter of this year.[29] A network's advertising revenue is solely dependent on the number and type of television viewers who will receive the advertisement. Advertisers do not care who owns a network; they only care how many and what kind of viewers the network

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27 See Disney Coalition Comments at 8. The Commission refers to UPN and WB as "incipient networks" in the PTAR NPRM, see NPRM at ¶ 47, and as "nascent broadcast networks" in the Further Notice of Proposed Rulemaking initiating its review of the television multiple ownership rules, Television Ownership FNPRM, at ¶ 112.

28 See, e.g., CBS Comments at 4-5; NBC Comments at 42-44. NBC suggests that, if the Commission declines to repeal PTAR, it should apply the rule to all broadcast networks reaching 50% or more of the country -- a threshold so low that a broadcast network could not possibly survive with such limited coverage.

29 See McClellan, ABC Takes Top Network Profit Honors, *Broadcasting & Cable,* Apr. 3, 1995, at 8-9 (NBC 1994 network profits up 101%, ABC 1994 network profits up 84%, and Fox 1994 network profits up 22%); McClellan, U.S. TV Boosts News Corp. Profits, *Broadcasting & Cable*, May 8, 1995, at 78 (operating profits of Fox Network and Fox O&Os increased more than 50% during the first quarter of 1995); Peers, UPN Loses $38 Million, *Variety,* Apr. 25, 1995.

reaches.[30] The new networks will therefore have to expand their coverage so that their reach is competitive with the established networks.

As discussed above, without PTAR, the new networks may be unable to do that.[31] Expanding the reach of the new networks to competitive parity with the established networks will be a very difficult enterprise, and one that is likely to take them significantly longer than it took Fox for a number of reasons. Chief among them is the simple fact that Fox absorbed many of the remaining independent stations, including most of those with the best coverage, leaving a much thinner base of independent stations to affiliate with the 5th and 6th networks. Indeed, in many markets, Fox absorbed the only independent commercial station that was available to affiliate with a new network. That explains why Fox launched with primary affiliates reaching 83.4% of television households, while UPN launched with primary affiliates reaching only 66.76% of households nationwide.[32] Obviously, an emerging network starting off with 66% coverage has much further to go to reach competitive parity than an emerging network that launches with 83% coverage.

Second, there are now two new networks each competing to expand its coverage at the same time, making it more difficult for each of them to achieve coverage parity with the established networks. Third, if the Commission relaxes the television multiple ownership

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30 See Owen and Wildman, Video Economics, at 25 (1992) (Because television programming is a "public good" with high fixed costs and low marginal costs, "[c]ompetitive advantage lies in reaching the largest audience for each product and in exposing the product in as many different markets as possible"). See page 23 note 42 infra.

31 See pages 12-13 supra.

32 See Viacom Comments, Appendix C.

rules, as it has proposed,[33] the established networks are likely to purchase a number of their strongest affiliates, thereby locking them into their current network affiliations.[34] This will foreclose a mode of expansion that was available to, and utilized by, Fox to its great advantage: acquisition of ownership interests in station groups in order to change their affiliation to that of the new owner's network.[35]

Given the foregoing facts, it is likely that the new networks will have to rely in significant part on entrepreneurs starting up new stations to expand their coverage. Convincing an investor to apply for a vacant television allotment or the holder of a dormant construction permit to build and commence operation of a full-power television station as the affiliate of an emerging network is no easy task. The emerging network, for starters, must hold out the prospect of a competitive prime time line-up. And during the years that the new network is expanding its program schedule, its affiliates must continue to purchase syndicated programming to fill their schedules. The lower ratings and inevitable declines in revenues and profits that would result from repeal of PTAR will weaken existing stations and discourage the start-up of new stations, thus hampering the expansion of the new networks.

The record in this proceeding demonstrates that the new networks have started out at an enormous disadvantage in competing with the established networks, both in the scope of

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33 See Television Ownership FNPRM, at ¶ 101.

34 The networks have already begun acquiring equity interests in station groups in order to lock in affiliates. See Viacom Comments at 36-39.

35 See, e.g., WLUK-TV, Green Bay, Wisconsin, 1995 FCC Lexis 2787 (Apr. 27, 1995) (approving assignment of WLUK-TV license to a subsidiary of SF Broadcasting, which is partially owned by Fox Television Stations, Inc.). See also Viacom Comments at 36-39.

their coverage and in their reliance primarily on UHF affiliates.[36] Those networks must expand if they are ever to become competitive forces in prime time television.[37] PTAR can play a vital role in helping the new networks surmount the obstacles in their path by strengthening and expanding their affiliate bases and helping their affiliates build an audience for their prime time schedules.[38]

Now is not the time, just as the new networks are getting off the ground, to discard PTAR and thereby deprive the public of all of the benefits of new networks:

- a new source of original programming during prime time and other dayparts, including children's programming;
- stronger, more competitive local stations (mostly UHF stations), capable of producing local news and other local programming;
- a competitive spur to the established networks;
- an alternative outlet to which members of the creative community can market their wares;
- new jobs in the television industry;
- increased competition in the national advertising market; and
- additional stations in large and small markets.

Economists Incorporated ("EI"), the networks' economist, makes the peculiar argument that it is inappropriate for the Commission to take steps to rectify the competitive imbalance in the television industry because that imbalance did not result, in its view, from

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36 See LECG Report at 88-95; Viacom Comments at 8-26.

37 See Viacom Comments at 8-15; pages 5-13 supra.

38 See id.

any pernicious behavior by the networks.[39] Even accepting EI's assessment that the competitive imbalance in the broadcast industry resulted largely from the Commission's VHF and UHF spectrum allocations and intermixture policy,[40] EI's public policy advice that the Commission should therefore do nothing to correct the imbalance is misguided, to put it mildly. The Commission has a special responsibility to foster competition and diversity in the broadcast industry -- a responsibility that it has often acknowledged and to which it has long been staunchly committed.[41] That responsibility is heightened, not diminished, where

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39 See EI Report at 1-4.

40 See id. The Commission's Network Inquiry Special Staff acknowledged in 1980 that the spectrum allocation plan for television adopted by the Commission in 1952 had "served effectively to limit television to a system dominated by three over-the-air advertiser-supported networks." Network Inquiry Special Staff, First Report, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, October 1980, at 6. Indeed, the Special Staff went so far as to assert that "[w]hatever economic power ABC, CBS and NBC possess is in large measure a result of Commission policies that protected them from potential competitors." Id. at 521. It also concluded that the 1952 allocation plan "seriously handicaps a fourth and additional networks by limiting their coverage and forcing them to affiliate with UHF stations in markets with many viewers. Id. at 6. See also Owen and Wildman, Video Economics, at 17 (1992) ("In 1958 the FCC could have remedied the scarcity of channels by making each city either purely UHF or purely VHF. This would have eliminated the engineering and image disadvantages of stations on UHF").

41 See, e.g., 47 CFR § 73.3555 (1994) (ownership rules designed to assure the dissemination of programming from a variety of diverse sources); Implementation of Commission's Equal Employment Opportunity Rules, 9 FCC Rcd 6276 (1994); First Report and Order in Docket No. 18110, 22 FCC 2d 306, 311 (1970), recon. granted in part, 28 FCC 2d 662 (1971) (one-to-a-market rule designed to foster diversity of broadcast ownership and viewpoints); National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (upholding chain broadcasting rules limiting network ownership of stations and efforts to control affiliate programming).

the Commission's own spectrum allocation policies have operated to limit competition in the broadcast industry.[42]

Moreover, the demonstrable success of PTAR in fostering the growth of independent stations and the emergence of fourth, fifth and sixth broadcast networks refutes EI's smug view that a world of three broadcast networks was the inevitable and irremediable "competitive equilibrium outcome" given the spectrum allocated to broadcasting.[43] The Commission did do something to rectify the competitive imbalance, and those measures were effective, although it has taken them a number of years to bear fruit -- first the growth of the Fox Network and now the emergence of the UPN and WB networks. Now that those measures are finally beginning to enhance competition and diversity at the national level, the Commission should not chop down the tree.

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42 EI's suggestion that PTAR is analogous to forbidding IBM to sell computers in 13 of the 50 states is similarly misguided. See EI Report at 2. Network dominance is attributable to governmental allocations of spectrum, not "superior products and better customer service," id., and it is entirely appropriate for the Commission to rectify the competitive imbalance that its spectrum allocations created. Moreover, broadcast television programming is a "public good," not a private good like IBM computers. See LECG Report at 8, quoting Owen and Wildman, Video Economics, at 23. A public good is a product whose "cost of production is independent of the number of people who consume it; more precisely, one person's consumption of such a good does not reduce the quantity available to other people." Video Economics at 23. Owen and Wildman explain that the "economic conditions for efficient allocation of a pure public good or a pure private good differ markedly." Id. Thus, EI's attempt to analogize the economic conditions for the production and broadcast of television programming to those for the manufacture of computers is fundamentally flawed.

43 See EI Report at 4.

IV. ANY TRANSITION MECHANISM ADOPTED BY THE COMMISSION SHOULD AFFORD THE NEW NETWORKS SUFFICIENT TIME TO MATURE SO THAT THEY CAN COMPETE WITH THE ESTABLISHED NETWORKS IN A DEREGULATED ENVIRONMENT.

The Commission has specifically requested comment on "a timetable that allows industry participants to adjust to the changing economic conditions that might result from modifications to PTAR."[44] The Commission suggests a number of transition measures that might be appropriate should it decide to modify or eliminate the rule.[45]

In light of the early stage of development of the fifth and sixth networks and the impact that immediate repeal would have on those fledgling enterprises, any transition measure adopted by the Commission must afford the new networks sufficient time to mature so that they can compete with the established networks in a deregulated environment. As the Disney Coalition states in its comments:

> The purpose of [infant industry protection] regulation, after all, is to enable fledgling firms to grow to a size sufficient to be self-sustaining. Once the government has given these firms sufficient opportunity to develop the size, skills and resources required to be viable competitors, therefore, the regulatory protection should be withdrawn. . . . To conclude otherwise would be to transform an agency's decision to provide initial support to an infant industry into a requirement that the agency provide perpetual protection for a particular class of competitors.[46]

Even accepting the Disney Coalition's argument that "perpetual protection" of an industry cannot be justified as a matter of public policy, the Commission should give the

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[44] Review of the Prime Time Access Rule, 9 FCC Rcd 6328, ¶ 61 (1994) ("NPRM").

[45] See NPRM at ¶¶ 61-64.

[46] Disney Coalition at 12.

emerging UPN and WB networks sufficient opportunity to develop to the size required to be viable competitors, to paraphrase the Disney Coalition.

The Commission should maintain PTAR in its present form, monitor the development of the fifth and sixth networks, and repeal the rule in whole or in part at such time as the Commission determines that repeal will no longer jeopardize the development of those networks or the viability of independent stations. The evidence presented in this proceeding of the impact of repeal certainly justifies this approach. Moreover, the momentous changes occurring in the television industry[47] make it prudent for the Commission to monitor industry conditions and retain PTAR until such time as it can confidently predict that repeal will not injure independent stations and emerging networks.

If the Commission nonetheless prefers to establish transition measures in this proceeding that will allow the industry to adjust to the change from the present long-standing regulatory regime to a deregulated environment, Viacom suggests the following mechanism:

> Sunset PTAR on the earlier of:
>
> 1) When a fifth (or fifth and sixth) network has matured sufficiently to compete in the marketplace without PTAR. Maturity should be measured by (a) affiliation with primary affiliates reaching at least 95% of television households and (b) a program schedule providing at least 15 hours of prime time programming per week; or
>
> 2) in 10 years, unless the proponents of retaining the rule can make a convincing showing in a proceeding initiated 6 months before the presumptive repeal date that repeal would

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[47] See Viacom Comments at 35-44.

cause severe market dislocations or otherwise be contrary to the public interest.[48]

Viacom's proposal is designed to give the new networks time to expand. The proposed repeal "triggers" -- the combination of audience reach and hours of prime time programming -- are the best indicia available that a network is mature enough to compete with the established networks in a deregulated environment. A network must have a minimum of 90% "in-pattern" coverage through primary affiliates to attract national advertisers, and it will not attain true competitive parity with the established networks until it

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48 As an alternative to the transition measure described in the text, Viacom would have no objection to adoption of the Commission's proposal to tie repeal of the rule to the "general availability of advanced digital television." NPRM at ¶ 61. Full implementation of the Commission's proposed Advanced Television ("ATV") regime would eliminate the UHF/VHF disparity because all stations would operate on UHF channels in the ATV mode. See Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service, 7 FCC Rcd 5376, 5379-80 (1992). The UHF/VHF imbalance is a key factor, as discussed above, in the competitive disequilibrium between the emerging networks and their entrenched competitors.

There appears to be momentum both at the Commission and in Congress toward implementation of broadcast ATV. Chairman Hundt recently indicated that the Commission plans to initiate at least three separate rulemaking proceedings during the next few months in order to set television broadcasters on the road toward a digital future. See Speech of Chairman Reed E. Hundt at National Association of Broadcasters Convention, April 11, 1995. While giving no precise timetable, Chairman Hundt stated that the Commission planned to establish the regulatory structure for the implementation of ATV "over the next year or two." Id. See also Speech of Chairman Hundt at National Cable Television Association Convention, May 9, 1995 (predicting FCC authorization of new ATV broadcast standard within one year); Speech of Chairman Hundt to Nieman Foundation at Harvard University, May 5, 1995 (predicting transformation of broadcast television to digital distribution over the next 2-8 years); Speech of Chairman Hundt at Museum of Television & Radio, May 23, 1995 (urging that the switch to digital reception be "swift, smooth and inexpensive"). Congress also envisions the allocation of ATV spectrum to existing television stations, and has proposed statutory parameters for the assignment of such spectrum. See H.R. 1555, 104th Congress, 1st Sess. Title III (1995); S. 652, 104th Congress, 1st Sess. § 207 (1995).

reaches 95% of television households.[49] Moreover, until a network supplies about 15 hours a week of prime time programming -- an average of 3 hours per weekday or about 2 hours seven days a week -- its affiliates must rely primarily on syndicated programming to fill their evening schedules. Once a network is providing 15 hours of prime time programming a week, its affiliates' ratings and financial position should be strengthened sufficiently so that they can better compete with the established networks' affiliates for syndicated programming for the periods preceding prime time. And the loss of some off-network programming by those strengthened stations should not threaten their viability.

Attainment of nationwide coverage and the expansion of a new network's prime time programming schedule are not unconnected developments. Until a network achieves full nationwide coverage and competitive ratings, it has great difficulty attracting national advertisers at competitive rates and thus cannot finance the expansion of its program schedule without incurring huge losses. The emerging network thus faces a Catch-22 situation: it needs nationwide coverage to attract national advertisers and finance the development of a substantial prime time schedule, but it must offer stations the prospect of a substantial prime time schedule in order to induce them to affiliate so that it can expand its coverage. Expanding coverage and an expanding program schedule are therefore likely to occur in tandem. The development of the Fox Network clearly illustrates this pattern.[50]

Viacom suggests an outside date of at least 10 years to presumptively repeal PTAR in order to give the new networks breathing room to expand their coverage and their program

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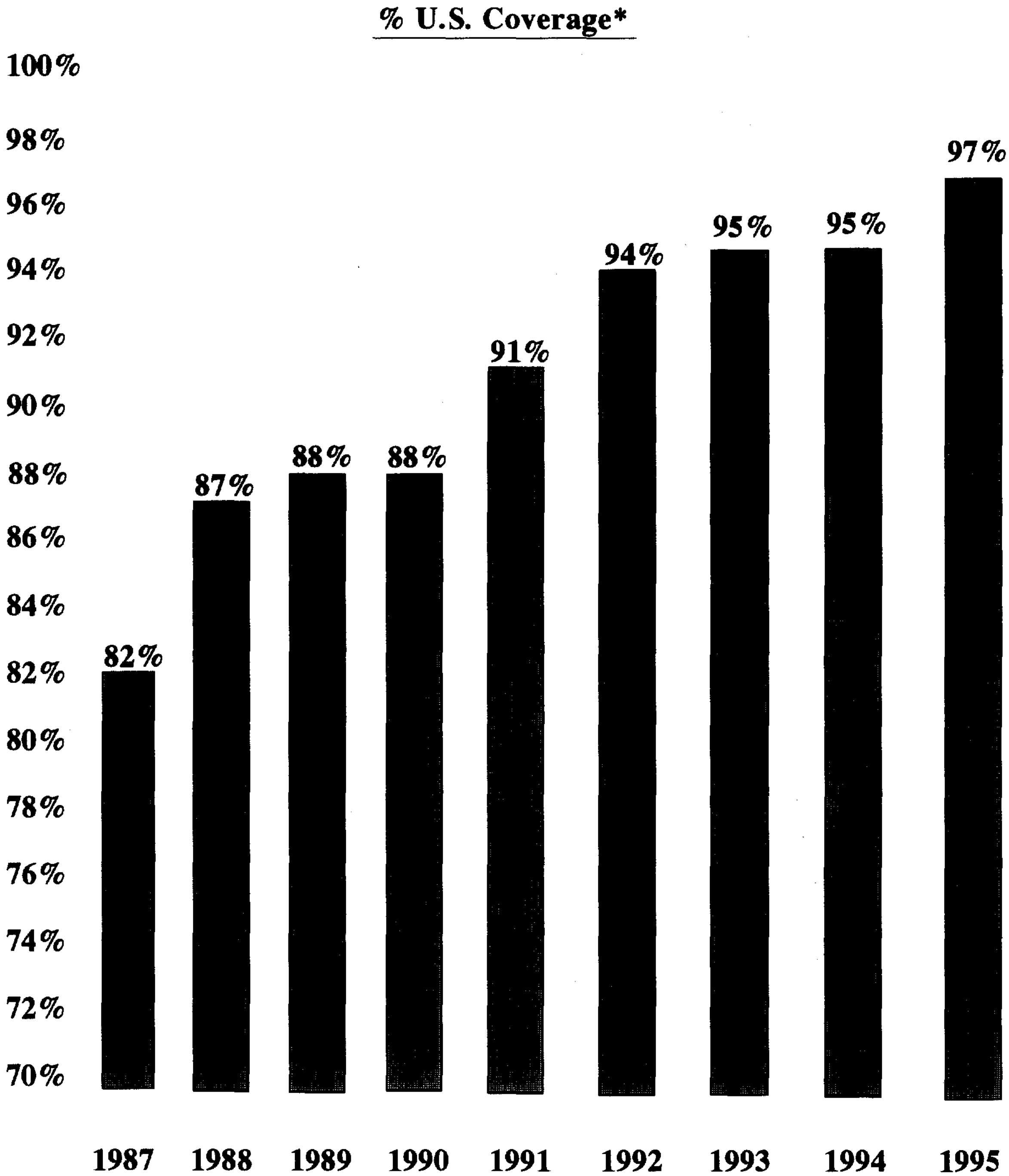
49 See pages 5-13 supra; Viacom's Comments at 8-15.

50 See pages 28-32 infra.

schedules so as to be competitive with the established networks. The Commission has before it the recent history of the development of the Fox Network to gauge how long that is likely to take. The Fox Network launched in 1986 and commenced broadcasting in prime time in 1987. As shown in the following charts, it took Fox four years from its prime time launch to achieve 91% coverage and six years to achieve 95% coverage. Fox still has not achieved 95% coverage with <u>primary</u> affiliates. It took Fox six years to expand its program schedule to 14 hours a week and seven years to expand to 15 hours a week. It was not until Fox had been broadcasting in prime time for six years that it regularly aired programming six nights a week.

FOX PRIME TIME ROLL-OUT HISTORY

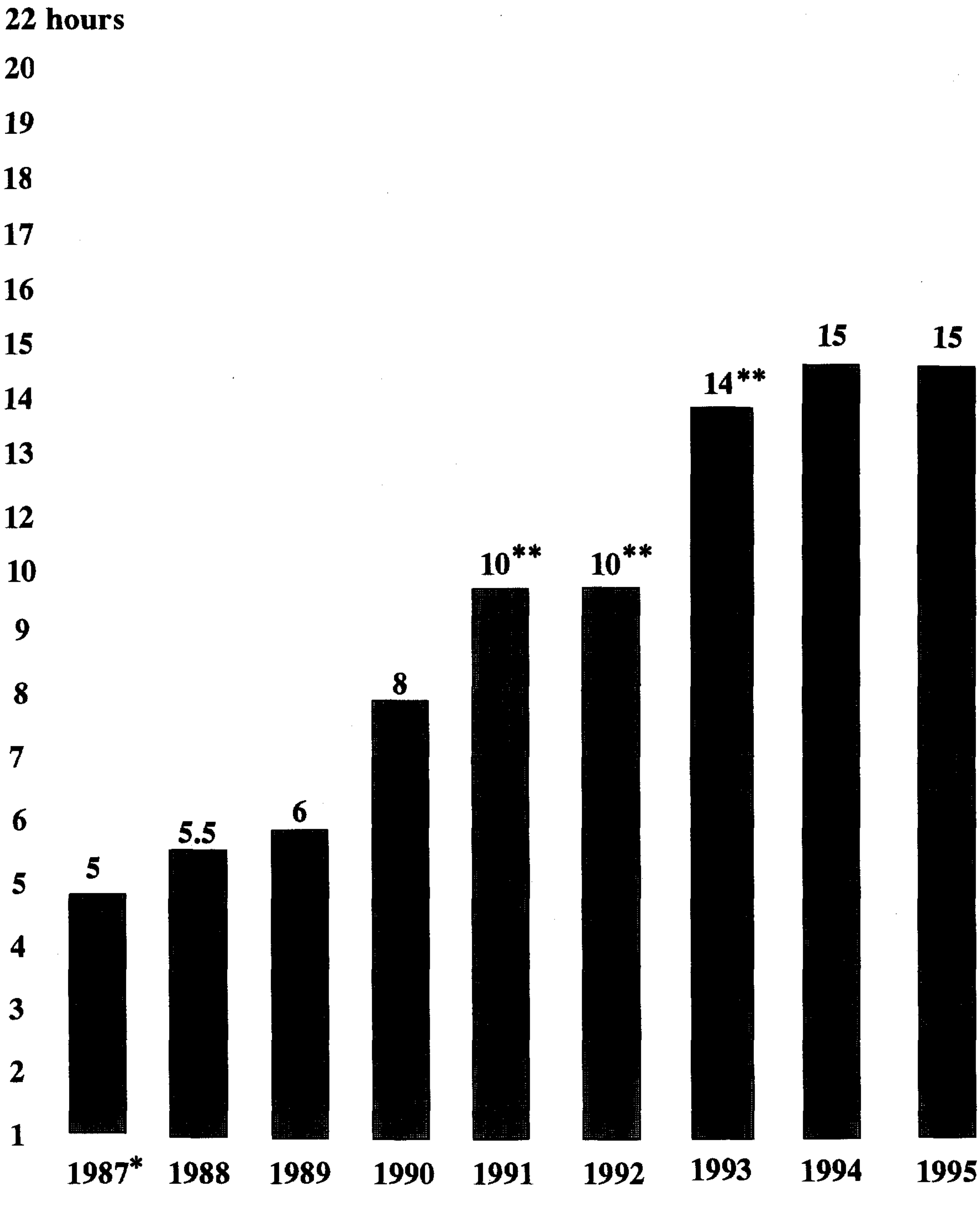


* U.S. coverage is an average of all nights, and represents the percentage of television households capable of receiving Fox programming. Coverage includes all Fox affiliates, both primary and secondary. Approximately 93% of Fox's programming is currently carried by primary affiliates, and the remainder is carried by secondary affiliates.

Source: NTI pocketpiece. All statistics are as of February of the specified year except 1987, which is as of July 1987 (the first month in which Fox qualified for network status in Nielsen reports).

FOX PRIME TIME ROLL-OUT HISTORY

Total Number of Hours Programmed



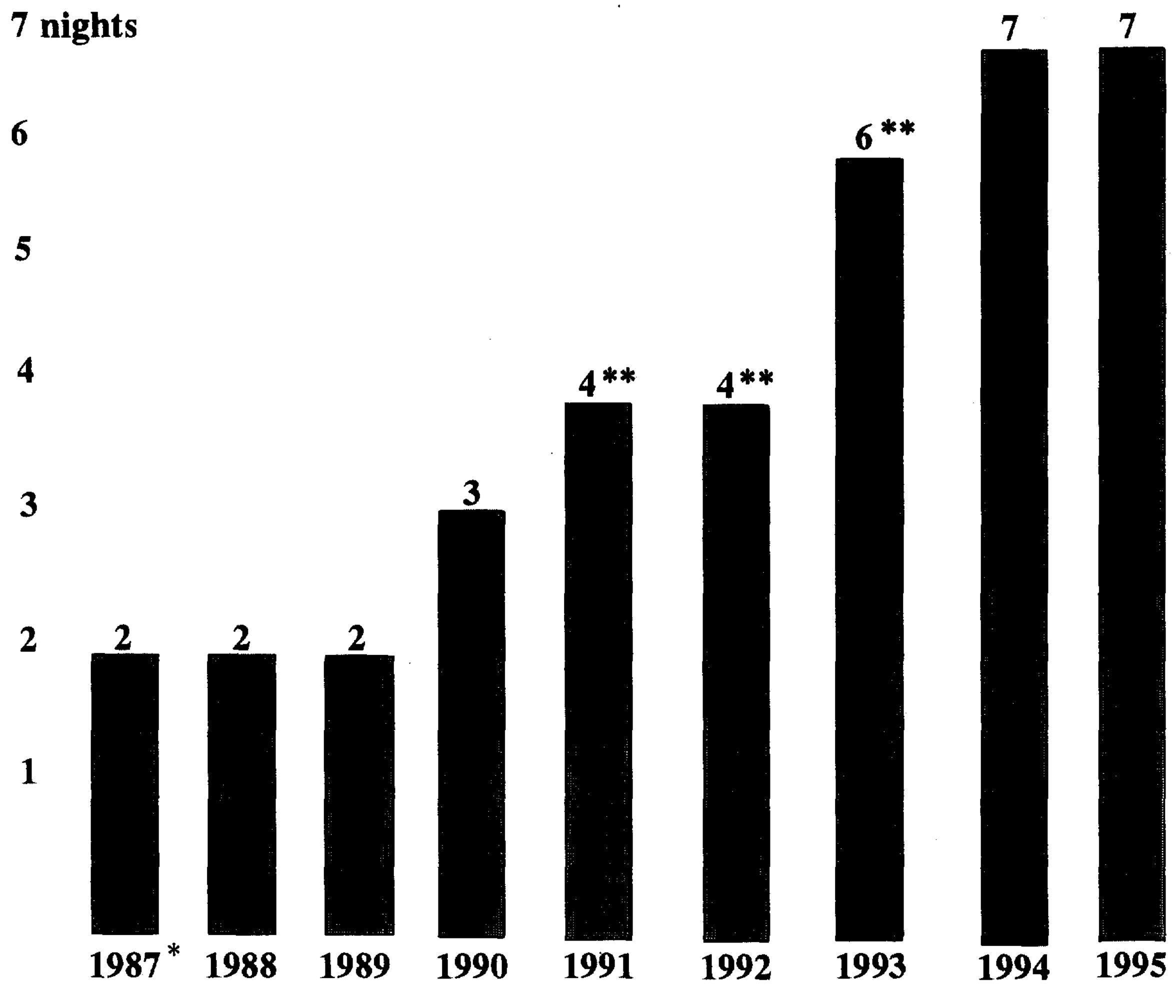
* Fox Sunday night prime time (3 hours programming) premiered April 5, 1987. Fox qualifies for network status in key A.C. Nielsen reports in July 1987.

** Once a month Monday night movie not included.

Source: NTI pocketpiece. All statistics are as of February of the specified year except 1987, which is as of July 1987 (the first month in which Fox qualified for network status in Nielsen reports).

FOX PRIME TIME ROLL-OUT HISTORY

Total Number of Nights Programmed



* Fox Sunday night prime time (3 hours programming) premiered April 5, 1987.
Fox qualifies for network status in key A.C. Nielsen reports in July 1987.

** Once a month Monday night movie not included.

Source: NTI pocketpiece. All statistics are as of February of the specified year except 1987, which is as of July 1987 (the first month in which Fox qualified for network status in Nielsen reports).

For the reasons discussed above,[51] it is likely to take the fifth and sixth networks substantially longer to achieve coverage parity and expand their prime time program schedules to 15 hours a week than it took Fox to reach these milestones. UPN was launched with far less in-pattern coverage by primary affiliates than Fox had in 1987 -- 66.76% compared with Fox's 83.4%. And there is a much thinner base of independent stations available today from which UPN can draw new affiliates. Thus, while there is no way of knowing in advance exactly how long it will take the new networks to achieve coverage parity and an expanded prime time schedule, it seems fair to predict that it will take a few years longer than the 6-7 years it took Fox. It is on this basis that Viacom has proposed the outside 10-year presumptive repeal date.

PTAR has been in effect for 25 years, and sudden repeal of the rule or its off-network component -- particularly in the midst of the other major changes shaking up the industry[52] -- would send shock waves through the ranks of independent stations and stymie the growth of the two new networks that commenced operation this year. This will have an anti-competitive effect both in local television markets and at the national level. Thus, if the Commission decides to set the television industry on a course toward a deregulated environment, it should adopt transition measures that will give the new networks breathing room to expand before PTAR sunsets.[53]

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51 See pages 19-20 supra.

52 See Viacom Comments at 35-44.

53 Cf. Television Ownership FNPRM, at ¶ 100 ("changes in the national multiple ownership rules should be incremental in order to avoid significant dislocation in the television industry").

CONCLUSION

For the foregoing reasons and those set forth in Viacom's opening comments, Viacom urges the Commission to retain the prime time access rule. If the Commission decides to adopt transition measures in this proceeding, those measures should give the incipient networks time to expand their coverage and their prime time programming schedules. Convulsive deregulation that arrests the development of the new broadcast networks in their infancy would run counter to the Commission's statutory mandate to "encourage the larger and more effective use of radio in the public interest"[54] and its long-standing commitment to fostering competition and diversity in the broadcast industry.

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May 26, 1995

54 47 U.S.C. § 303(g) (1991).

APPENDIX A

APPENDIX A
TO REPLY COMMENTS OF VIACOM INC.

I. REPLY TO THE NETWORKS

A. The Evidence in this Proceeding Establishes that PTAR Has Contributed to the Growth of Independent Television Stations and the Emergence of New Television Networks.

The established networks all credit the growth of independents stations and the emergence of new broadcast networks -- Fox, UPN and WB -- as providing additional sources of diverse programming and competition with ABC, CBS and NBC, rendering PTAR unnecessary, in their view.[1] Yet they deny PTAR's contribution to the growth in the number of independent television stations and the continuing role it plays in making independent stations viable competitive forces in local markets. And they ignore the important role PTAR has played and will continue to play in fostering the growth of new networks.

The networks' arguments that PTAR has not contributed to, and is not necessary to preserve, diversity and competition in the television industry rest on several unsupported and erroneous assumptions. These are discussed below.

(1) The Growth of Independent Stations During the 1980's Is Not Attributable to the Growth of Cable.

While the networks concede that PTAR has boosted the performance of independent stations, CBS and NBC both assert that there is no evidence that PTAR was ever responsible

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1 See NBC Comments at 20, 27-28; CBS Comments at 4-5, 23; ABC Comments at 18.

for the growth of independent stations.[2] Rather, they attribute that growth to increases in cable penetration and a growing television advertising market.[3]

Contrary to the networks' contention, there is abundant empirical evidence that PTAR has made an important contribution to the ratings performance, financial health and growth of independent stations. The Economic Report submitted by The Law and Economics Consulting Group, Inc. ("LECG Report") in this proceeding demonstrates, based on publicly available ratings data, that "PTAR has had a positive and measurable long run impact on the number of stations in the local broadcast markets."[4] That conclusion is based not on vague, unsubstantiated speculations like those contained in the networks' comments, but rather on econometric analysis of extensive ratings data for independent stations in thirty of the top-50 markets for fourteen selected years before and after the adoption of PTAR.[5]

LECG's econometric model controlled for other factors that may have had an effect on independent station performance in order to isolate the effect of PTAR. One of the factors controlled for was the increase in cable penetration.[6] LECG found that "while PTAR had a positive first order impact on a station's ratings of 1.52 points on average each and every year

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[2] NBC Comments at 31; CBS Comments at 21. CBS concedes that PTAR "certainly had a salutary effect on the bottom lines of some of these stations," but downplays the importance of that effect and contends that "[t]here is no evidence whatsoever that PTAR has been responsible for the birth or the survival of any television station." CBS Comments at 21.

[3] See id. CBS also cites the "efficient national delivery of syndicated programming by satellite" as a contributor to independent station growth. CBS Comments at 21.

[4] LECG Report at 54.

[5] Appendix C of LECG's Report describes that database. That database has been supplied to the Commission and all parties have access to it.

[6] See LECG Report at 54-57 and Appendix D.

following implementation, cable had a negative long run impact of 1.93 points on average."[7] LECG explains that while the spread of cable may initially have had a positive "antenna effect" on independent UHF stations, the reception of which was improved by cable carriage, increasing cable penetration had a negative effect on independent stations in the long term as increasingly popular cable channels siphoned audiences away from independent stations.[8]

This analysis is confirmed by LECG's review of financial data for network affiliates and independent stations, which shows that the profitability of UHF independents deteriorated badly and the gap between affiliate and independent station profitability widened during the 1980s, the period of greatest cable expansion.[9] While new cable channels compete with all broadcast television channels for viewer attention, they appear to have taken a greater toll on independent stations than network affiliates; the latter enjoy greater visibility, promotion and better cable channel positioning than most independent stations.[10]

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7 LECG Report at 56 (emphasis added). See also id., Appendix D, Table D.4.

8 Id. at 56.

9 Id. at 31-41.

10 See id. at 40. Given the deteriorating financial position of the average independent station during the 1980s, the growth in independent stations' advertising revenues cited by CBS and NBC as a cause of independent station growth instead appears to be simply a reflection of the growing number of independent stations, which of course collected greater aggregate revenues. This point is made in the OPP Paper, which observed that while viewing of independent stations increased in the aggregate during the 1980s, the profits of the average independent station fell far more than those of the average affiliate because viewership per independent station was low. See Selzer and Levy, Broadcast Television in a Multichannel Marketplace, OPP Working Paper No. 26, 6 FCC Rcd 3996, 4026 (1991) ("OPP Paper").

(2) Independent Stations -- Including Those Which Form the Foundations of the New Networks -- Depend on Popular Off-Network Programming During the Access Hour.

The networks do not dispute that popular off-network programs would migrate from independent stations to network affiliates if PTAR were repealed. Indeed, this seems to be one prediction that is generally shared by the commenters in this proceeding.[11] Yet the networks flippantly suggest that independent stations no longer depend on access to popular off-network programs and could simply substitute first-run programs if PTAR were repealed and top-50 market affiliates outbid independents for the most desirable off-network programming.[12]

This suggestion was rejected by the Commission as recently as 1993 and is again convincingly refuted by the LECG Report and data submitted with INTV's Comments. In the fin-syn proceeding, the Commission specifically recognized the importance to independent stations of popular off-network programming:

> The record clearly establishes that off-network hits draw successful ratings for independent stations during early fringe hours, which is the single greatest revenue producing period for these stations. We also find support in the record for the idea that independent stations would be harmed if they could not obtain "hit" off-network shows.

Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd 8270, 8294 n.64 (1993), on recon., aff'd, Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994) (citation omitted).

In its comments in this proceeding, INTV submitted updated data focusing specifically on the prime time access hour which demonstrates again the importance of off-network

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11 See, e.g., CBS Comments at 12; NBC Comments at 21, 34.

12 See NBC Comments at 21-22; ABC Comments at 16-17.

programming to independents. The data shows that over 75% of the programming aired by independent stations and Fox affiliates in the top-50 markets during the access hour is off-network programming, and over 56% of those stations' access programs are off-network programs from ABC, CBS and NBC[13] -- programming that would likely migrate to network affiliates if PTAR were repealed. Furthermore, the access hour generates a disproportionate amount of those stations' ratings points and revenues.[14]

The networks' suggestion that most independent stations no longer depend on syndicated programming because they are almost all affiliated with Fox or one of the new networks -- UPN or WB -- is equally insupportable.[15] UPN and WB each commenced operation in January of this year, UPN with 4 hours and WB with 2 hours of prime time programming. It is patently absurd to posit that independent stations no longer depend on a supply of popular syndicated programming because of their affiliation with these fledgling enterprises when they still have to fill almost their entire broadcast schedules with non-network programming. It will be years before the new networks are able to compete on anything approaching an equal footing with the established networks and, as INTV observes, "[d]uring their developmental phases, their independent affiliates must continue to succeed financially as independent stations."[16] The new networks will never mature and become successful

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13 See INTV Comments at 42, INTV Exh. 2, Result Tables, p. 1.

14 See INTV Comments at 42-44.

15 See CBS Comments at 7; NBC Comments at 33.

16 INTV Comments at 60. See also Comments of the UPN Affiliates Association at 8-9. It should be noted that the stations affiliated with the new networks do not enjoy network compensation like the affiliates of the established networks. Indeed, stations affiliated with WB are required to pay compensation to that network. See Tobenkin, New Players Get Ready to Roll, *Broadcasting & Cable*, Jan. 2, 1995, at 30.

competitors without an expanding base of financially strong independent stations with which to affiliate.[17] PTAR remains an important contributor to the financial strength of those stations.[18]

Contrary to the networks' suggestion, independent stations could not simply substitute first-run programming for the popular off-network programming that would migrate to affiliates if PTAR were repealed without loss of ratings and profits. Prior to the adoption of PTAR, the first-run syndication industry was almost non-existent because independent stations alone could not support the production and distribution of first-run programming. Although there are many more independent stations now than there were in 1970, they are still, on average, far less profitable than network affiliates, and could not afford to pay what affiliates can afford to pay for first-run programming.[19] Indeed, the record in this proceeding establishes that broadcast of a program on a UHF channel substantially depresses a program's ratings.[20] Since most independents are UHF stations and most affiliates are VHF stations, independents can expect to garner lower ratings and thus generate lower advertising revenues from broadcasting the same program than their network affiliate counterparts. This being the case, they could not afford to pay as much for programming as affiliates.

Thus, if PTAR were repealed and affiliates substituted off-network for first-run syndicated programming, as the commenting parties generally predict,[21] independent stations

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17 See Viacom Reply Comments, Sections II and III supra.

18 See id.

19 See LECG Report at 31-45, 63-85.

20 LECG Report at 43-44.

21 See, e.g., CBS Comments at 12; NBC Comments at 21, 34; LECG Report at 63-85.

alone could not support production of the kind of first-run programming now purchased by network affiliates.[22] Moreover, even if popular first-run syndicated programming did continue to be produced, such programming would usually be more expensive for independent stations to purchase than the off-network programs that they currently air during the access hour,[23] and thus would cause a decline in independent station profitability that could be fatal to marginal stations.

(3) **The UHF Handicap Has Not Disappeared.**

ABC, CBS and NBC declare in unison that the "UHF Handicap" -- the technological disadvantage that has historically depressed the performance of UHF stations -- has either disappeared or has been "greatly reduced."[24] The only authority cited by the networks for this emphatic declaration is an economic analysis by the networks' economists that is based on such an unrepresentative sample and yields such nonsensical conclusions that even those economists are forced to reject the results!

The sum total of EI's effort to determine empirically whether the UHF handicap persists is its replication with 1993/94 data of a study conducted in 1979 by R. E. Park for the FCC, which attempted to measure the effect of cable carriage on UHF stations.[25] Park's sample of stations was confined to those located in a few rural counties in the Southeastern United States

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[22] See King World Comments at 11-15.

[23] See LECG Report at 57-85.

[24] See CBS Comments at 21-22 (the UHF handicap "can empirically be shown to be substantially a thing of the past"); ABC Comments at 16 (the UHF handicap of independent stations has been "greatly reduced"); NBC Comments at 22 (the UHF handicap has been "greatly reduced").

[25] See EI Report, Appendix C.

-- a small and unrepresentative sample that EI perpetuates by utilizing the same sample. Moreover, neither Park nor EI made any attempt to control for other factors that may influence the ratings of a UHF station. And EI did not even attempt to distinguish between local and distant signals, as Park did in his study; thus, a station like Turner Broadcasting's WTBS superstation would be treated like any other UHF station in the EI analysis.

EI's updated study yields the conclusion that the UHF handicap of UHF affiliates of ABC, CBS and NBC remained "relatively unchanged" since the 1977/78 season studied by Park, but the UHF handicap of other UHF stations had "disappeared entirely." Faced with this nonsensical result, EI is forced to backpeddle, conceding that the study is not based on a representative sample and speculating that a representative sample "doubtless would confirm the common-sense hypothesis that the UHF handicap has been greatly reduced for all classes of station."[26]

There is no need to speculate concerning what a study based on a representative sample would show because LECG has submitted the results of such a study in this proceeding. LECG conducted a regression analysis to determine whether the ratings of the same Fox network programs aired during two half-hour time periods on five weekday evenings were affected by whether the Fox affiliate was a UHF or VHF station. That analysis utilized a national sample of all Fox stations in the 75 largest markets in 1993.[27] The study controlled for a number of other factors, such as the number of other stations in the market, the number

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[26] EI Study, Appendix C at 84.

[27] Fox affiliate ratings in 74 of those 75 markets were studied because one market did not have a Fox affiliate. See LECG Report at 42 n.26.